LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 2 1955
HAROLD B. WILLEY, Clerk

n the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 204.

OCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,
Appellant,

vs.

JOHN W. PECK,
Tax Commissioner of Ohio.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLANT.

DAVID A. GASKILL,
JAMES A. WEEKS,
ROBERT F. MASKEY,
EDGAR P. STOCKER,
1100 National City Bank Bldg.,
Cleveland 14, Ohio,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8847

SUBJECT INDEX.

Opinions Below 1

Jurisdiction 1

Question Presented 2

Constitutional Provision and Statutes Involved 2

Statement of Facts and Rulings Below 4

Summary of Argument 6

Argument:

I. The principle that a nondiscriminatory State property tax upon corporate capital or surplus violates the constitutional and statutory immunity of federal obligations, if the latter are included in the valuation of assets on which the tax is based, is well established and basically sound 8

II. A tax upon shares of stock, as property of the stockholders, is distinguishable from a tax upon property of the corporation; but this distinction is meaningless in the case of a tax upon an incorporated mutual savings bank, measured by its net worth where the bank alone is liable for the tax, and where no right of reimbursement is provided 16

III The characterization of the tax by the Supreme Court of Ohio, as a tax upon property of depositors, is not conclusive in determining the real nature of the tax and its effect upon the federal right asserted 26

Conclusion 27

Appendix A 28

CITATIONS.

Cases.

Bank of Commerce v. New York City, 2 Black 620 ..... 6, 10, 11, 15, 17, 20

Bank Tax Case, 2 Wall. 200 ..... 10, 11

Cleveland Trust Co. v. Lander, 184 U. S. 111 16

Collett v. Springfield Savings Society, 13 O. C. C. 131, 7 O. C. D. 146, aff'd without opinion, 56 O. S. 776 25

Des Moines National Bank v. Fairweather, 263 U. S. 103 16

Farmers Bank v. Minnesota, 232 U. S. 516 ..... 7, 11, 13, 17, 20

Home Savings Bank v. Des Moines, 205 U. S. 503 ..... 7, 10, 17, 19, 20, 21, 22

Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110 26

M'Culloch v. Maryland, 4 Wh. 316 11

Missouri v. Gehner, 281 U. S. 313 ..... 11, 12

New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U. S. 665 ..... 11, 12-13, 20, 26

Richfield Oil Corp. v. State Board, 329 U. S. 69 26

Senior v. Braden, 295 U. S. 422 26

Smith v. Davis, 323 U. S. 111 15

United States v. Allegheny County, 322 U. S. 174 26

Van Allen v. Assessors, 3 Wall. 573 ..... 6, 16

Weston v. City Council of Charleston, 2 Peters 449 ..... 11, 15

Wisconsin v. J. C. Penny Co., 311 U. S. 435 ..... 7, 26

Constitution of the United States.

Art. I, Sec. 8, Cl. 2 2

Art. VI, Cl. 2 2

Statutes.

U. S. Revised Statutes, Sec. 3701 (31 U. S. C., Sec. 742) 2-3, 15

62 Stat. 929, Sec. 1257(2) (28 U. S. C., Sec. 1257(2)) 1

Ohio General Code:

Sec. 5324 28

5406 ..... 8, 28

5408 ..... 3, 4, 5, 8, 9, 19

5409 ..... 9, 29

5411 29

5411-1 29

5411-2 30

5412 ..... 3, 4, 5, 8, 9, 19

5638-1 ..... 8, 9, 30

5672 ..... 9, 31

5673 ..... 9, 31

5673-1 ..... 9, 32

5673-2 ..... 9, 32

Miscellaneous.

U. S. Department of Justice study entitled "Taxation of Government Bondholders and Employees," U. S. Government Printing Office, 1938 15

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 204.

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,
Appellant,

vs.

JOHN W. PECK,
Tax Commissioner of Ohio.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio (R. 30) is reported in 161 O. S. 122, 118 N. E. 2d 651.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered March 10, 1954. (R. 53.) Application for rehearing was denied March 31, 1954. A petition for allowance of an appeal to this Court was presented to, and granted by, the Chief Justice of the Supreme Court of Ohio on June 3, 1954 (R. 1). On October 14, 1954, this Court noted probable jurisdiction. The statutory provision which sustains the jurisdiction of this Court to review the judgment appealed from is 62 Stat. 929, Sec. 1257(2); U. S. Code, Title 28, Sec. 1257(2).

THE QUESTION PRESENTED.

This case presents the question, whether or not a non-discriminatory property tax assessed by the State of Ohio against an incorporated mutual savings bank, based upon and measured by the bank's net worth (meaning the excess book value of its assets over its liabilities) without deduction of the value of United States government obligations owned by the bank, violates the Borrowing Clause (Art. I, Sec. 8, Cl. 2) and the Supremacy Clause (Art. VI, Cl. 2) of the Constitution of the United States, or Section 3701 of the Revised Statutes of the United States (U. S. Code, Title 31, Sec. 742), by taxing obligations of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article I, Section 8, Clause 2 of the Constitution of the United States provides:

> "The Congress shall have Power * * *
>
> "To borrow Money on the credit of the United States;"

Article VI, Clause 2 of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 3701 of the Revised Statutes of the United States (U. S. Code, Title 31, Sec. 742) provides:

"Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

The Ohio statutes which impose the tax in question, and constitutionality of which is challenged, are Sections 5408 and 5412 of the Ohio General Code (Page's Ohio General Code, Lifetime Edition, and 1952 Cumulative Supplement; Throckmorton's Ohio Code, 1948 Revision, and 1952 Cumulative Supplement). These statutes provide:

"Sec. 5408: All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divded into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."

"Sec. 5412: Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts

of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Other pertinent Ohio statutes are set forth in Appendix A, *infra*, pages 28-32.

STATEMENT OF FACTS AND RULINGS BELOW.

The appellant, Society for Savings in the City of Cleveland, is incorporated under the laws of the State of Ohio as a mutual savings bank. It has no permanent capital divided into shares, no capital stock and no shareholders. (R. 6.)

As required by Ohio law, the Society for Savings filed annual tax returns for the years 1947 to 1951, inclusive, stating for each year the book value of its assets, including obligations of the United States owned by it. (R. 6.)

Taxes were assessed, pursuant to Sections 5408 and 5412, Ohio General Code, against the Society for Savings, and paid by it, in the aggregate amount of $126,115.96, computed upon the book value of the "property representing the capital employed by" the bank, measured by its surplus or reserves (it had no undivided profits) as shown in the returns. (R. 4, 7.) If the book value of United States obligations owned by the bank had been excluded from the tax base there would have remained no "capital, surplus or reserve fund and undivided profits" (Section

5412, Ohio General Code), that is to say net worth, subject to tax.

A claim for refund, termed an "Application for certificate of abatement," was duly filed by the bank with the Tax Commissioner of Ohio, claiming that the federal constitution and statute precluded the State from taxing an incorporated mutual savings bank upon its "value of the property representing the capital employed" unless the State excluded from the tax base the value of United States obligations owned by the taxpayer. (R. 3-5.) The Tax Commissioner denied the application. (R. 5.)

Upon appeal, the Board of Tax Appeals of Ohio reversed the order of the Tax Commissioner and directed him to issue a certificate of abatement to the taxpayer. The journal entry of the Board of Tax Appeals (R. 18-30) predicated the action of the Board squarely upon the proposition that the tax was violative of the federal constitution and statute unless the value of United States obligations owned by the taxpayer was excluded from the tax base.

The Tax Commissioner appealed to the Supreme Court of Ohio, which, with one judge dissenting, reversed the decision of the Board of Tax Appeals and affirmed the original order of the Tax Commissioner. (R. 53.) The majority and dissenting opinions of the Supreme Court of Ohio appear in the Record at pages 30 and 48.

The validity of the Ohio tax statutes, Sections 5408 and 5412, Ohio General Code, in the light of the federal constitutional and statutory provisions exempting obligations of the United States from State taxation, has been questioned at every step of these proceedings.

Appeal has been taken by the Society for Savings to the Supreme Court of the United States, which has noted probable jurisdiction. (R. 54.)

SUMMARY OF ARGUMENT.

The principle is well established by the so-called Bank of Commerce line of cases (*Bank of Commerce v. New York City*, 2 Black 620) that a nondiscriminatory State property tax upon capital or surplus (i.e., net worth) of corporations violates the constitutional and statutory immunity of federal bonds and other obligations, if such bonds or obligations are included in the valuation of assets on which the tax is based.

This principle is basically sound, because the federal government must be unhindered in its financial operations, and even a low-rate nondiscriminatory State tax may affect the marketability of federal bonds. If a low rate tax is permitted, the door is open for more burdensome State taxation.

In the present case, an incorporated mutual savings bank has been required by the State of Ohio to pay a property tax of two mills on the dollar upon the book value of its surplus or reserves (i.e., its net worth). The bank is not authorized to reimburse itself from its depositors or from anyone else, for the tax so paid; nor are the depositors or separate property of depositors made liable under any circumstances for payment, or for reimbursement for payment, of the tax.

The rule of *Van Allen v. Assessors*, 3 Wall. 573, distinguishing a tax upon shares of stock as property of stockholders from a tax upon corporate capital, can have no application where a mutual savings bank is the taxpayer. The depositors in a mutual savings bank do not possess a property right or "intangible ownership interest" in the surplus or reserves of the bank which is separate and apart from their rights as depositors or is, in any way, analogous to the property right of stockholders in shares of stock held

by them. Whatever rights depositors may have in the event of a solvent liquidation of a mutual savings bank are not vested while the bank is a going concern, and cannot be valued, bought, sold or realized upon in any way.

The Supreme Court of Ohio has characterized the tax as one upon "intangible ownership interests" (R. 42, 43) belonging to the depositors in a mutual savings bank. However, even in the case of banks having stockholders, it is held that a tax upon the stock, measured by the bank's net worth and payable by the bank, is unconstitutional to the extent that the value of federal obligations owned by the bank is included in the tax base, unless the bank is given a right to recoup the tax paid from its stockholders. *Home Savings Bank v. Des Moines*, 205 U. S. 503.

In the present case the tax burden falls exclusively upon the bank which is the owner of United States obligations, and it necessarily follows that the tax is invalid to the extent that it is based upon value attributed to such securities. *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516.

The characterization of the tax, by the Supreme Court of Ohio, as a tax upon "intangible ownership interests" of depositors, is not conclusive. "The descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction." *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 443.

ARGUMENT.

I.

THE PRINCIPLE THAT A NONDISCRIMINATORY STATE PROPERTY TAX UPON CORPORATE CAPITAL OR SURPLUS VIOLATES THE CONSTITUTIONAL AND STATUTORY IMMUNITY OF FEDERAL OBLIGATIONS, IF THE LATTER ARE INCLUDED IN THE VALUATION OF ASSETS ON WHICH THE TAX IS BASED, IS WELL ESTABLISHED AND BASICALLY SOUND.

A. The tax in question is an ad valorem personal property tax, assessed against and paid by a mutual savings bank, measured by the net worth of the bank, and without any right of the taxpayer to reimbursement from any other party.

In this case the Supreme Court of Ohio has sustained an ad valorem property tax upon the "capital employed or the property representing it" (Ohio General Code, Section 5408, *supra*, page 3) in an incorporated mutual savings bank, even though the value of bonds and other obligations issued by the United States, and owned by the bank, was included in the tax base. The tax was assessed against and paid by the bank, appellant herein. There is nothing in the law of Ohio which (a) imposes tax liability upon depositors or any person other than the bank, or (b) gives the bank a right to reimbursement from any person.

The general system employed by the State of Ohio for taxing banks during the period in question (1947-1951) was as follows:

> (1) TAX ON DEPOSITS. Each bank was required to report annually the amount of its deposits, and to pay a tax of two mills per dollar on the amount thereof (Ohio General Code, Sec. 5406, 5412, 5638-1). Such tax constituted a property tax upon property of the depositors. While the bank was required to pay

the tax, it was explicitly empowered to reimburse itself by deducting the amount paid from the deposits so taxed or the interest or dividends thereon (Ohio General Code, Sec. 5673-1, 5673-2).

(2) Tax on Shares of Stock. Banks having capital divided into shares were required to report annually the value thereof (measured by book value of the banks' capital, surplus and undivided profits) and to pay a tax of two mills per dollar on the amount thereof (Ohio General Code, Sec. 5408, 5412, 5638-1). Such tax constituted a property tax upon property of the shareholders. While the banks were required to pay the tax they were explicitly empowered to reimburse themselves out of dividends, and to secure such reimbursement they were given a lien upon the shares themselves and upon all other funds of the shareholders in the banks' possession (Ohio General Code, Sec. 5672, 5673).

(3) Tax on Capital Employed. Banks having no shares were required to report annually the "capital employed, or the property representing it" in such banks (Ohio General Code, Sec. 5408), measured by the book value of their capital, surplus and undivided profits (Ohio General Code, Sec. 5412); and to pay a property tax of two mills per dollar on the amount thereof (Ohio General Code, Sec. 5638-1). The law made no provisions whereby such banks could reimburse themselves for the tax paid, either by imposing a direct personal liability for the tax, or an indirect liability by way of a right to reimbursement, on anyone other than the banks.

(4) Tax on Real Estate. Real estate of banks was taxed locally, just as other real estate was taxed (Ohio General Code, Sec. 5409).

(5) FRANCHISE TAX. Banks were required to pay an annual franchise tax, upon the same basis as other corporations.

The present litigation is concerned with taxes assessed and paid under the third category. Though having particular reference to the tax years 1947 to 1951, inclusive, the foregoing system has not been changed and continues to represent the mode employed by the State of Ohio for taxing banks.

B. The principle is firmly established that the constitutional and statutory immunity from State taxation of federal obligations precludes a State from exacting a property tax from a corporation measured by its net worth, unless (1) the value of federal obligations owned by the corporation is excluded from the tax base, or (2) the taxpayer is entitled to reimbursement from some third person whose property, separate and distinct from the corporation's property, constitutes the subject matter of the tax.

In the present case the Supreme Court of Ohio did not challenge the basic principle, established by numerous decisions of the Supreme Court of the United States, that a property tax upon a corporation, measured by its net worth, violates the constitutional and statutory immunity of obligations issued by the federal government, if the value of such obligations is included among the assets evaluated in calculating net worth.

That rule, first pronounced in *Bank of Commerce v. New York City*, 2 Black 620 (1863), has been reaffirmed in numerous later cases of which the following are especially notable: *Bank Tax Case*, 2 Wall. 200 (1864); *Home Savings Bank v. Des Moines*, 205 U. S. 503 (1907);

Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516 (1914); *Missouri v. Gehner*, 281 U. S. 313 (1930); *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U. S. 665 (1950).

In *Bank of Commerce v. New York City*, 2 Black 620 (1863), a New York tax upon the capital stock of banks, assessed against the banks themselves and measured by actual value of the stock, was held unconstitutional, when so applied as to include, in the property taxed, value attributable to federal obligations owned by the banks. It was held that the effect of the assessment was to tax obligations of the United States contrary to the decisions in *M'Culloch v. Maryland*, 4 Wh. 316 (1819) and *Weston v. City Council of Charleston*, 2 Peters 449 (1829). The Court expressly recognized (2 Black, at 629) that the New York statute and assessment did not discriminate against obligations issued by the United States.

As a result of the *Bank of Commerce* decision, New York amended its statutes in such manner as to tax banks upon the aggregate amount of their paid-in capital and surplus. In the *Bank Tax Case*, 2 Wall. 200 (1864) this latter tax was held unconstitutional when so applied as to include, in the tax base, the value of federal securities owned by a bank. The Court said (2 Wall. at 208 and 210):

> "* * * It is not easy to separate the property in which the capital is invested from the capital itself. * * * The capital is not an ideal, fictitious, arbitrary sum of money set down in articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. * * *
>
> "Having come to the conclusion that the tax on the capital of the Bank of the Commonwealth is a tax on the property of the institution, and which consists

of the stocks of the United States, we do not perceive how the case can be distinguished from that of the Bank of Commerce v. New York City, 2 Black 620, heretofore decided by this court."

In *Missouri v. Gehner*, 281 U. S. 313 (1930) the Court held a Missouri tax upon insurance companies, measured by the net value of their assets, to be invalid. Although federal securities were excluded from gross assets, deductible liabilities were reduced proportionately, and this was held to create, indirectly, a tax burden on the federal obligations. The Court said, at pages 320-321:

> "It is elementary that the bonds or other securities of the United States may not be taxed by state authority. That immunity always has been deemed an attribute of national supremacy and essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose. As the tax-exempt feature tends to increase and is reflected in the market prices of such securities, a state tax burden thereon would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government. It necessarily follows from the immunity created by federal authority that a State may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities. *Neither ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States.*" (Emphasis supplied.)

A New Jersey tax upon insurance companies, measured by a fixed percentage of capital and surplus, was held invalid because the value of federal securities was included in the tax base, in *New Jersey Realty Title Ins. Co.*

v. Division of Tax Appeals, 338 U. S. 665 (1950). The Court said, at page 673:

> "It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part upon federal bonds. We can only conclude that the tax authorized by § 5415-22, whether levied against capital and surplus less liabilities or against entire net worth, is imposed on such securities regardless of the accounting label employed in describing it."

Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516 is an authority directly in point, and sustains the position of the appellant in the present case. The question was whether the State of Minnesota, in taxing the net worth of a mutual savings bank, could lawfully include, as part of the tax base, the value of federal securities (bonds issued by municipalities situated in territories of the United States) owned by the bank. Holding that the value of such securities could not be included, the Court said in part (pages 520, 528):

> "* * * Plaintiff in error is a *savings bank, having no capital stock*, and was taxable under No. 839, R. L. (Minn.) 1905, which provides for ascertaining the surplus remaining after deducting from its assets (other than real estate, which is separately assessed), the amount of the deposits and of all other accounts payable; the surplus to be taxed as 'credits.' *The Supreme Court of Minnesota held that this section imposes not a franchise but a property tax, and that the surplus of savings banks as thus determined is taxable property.* * * *
>
> " * * * *

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the Savings Bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. *But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds.* In Bank of Commerce v. New York City, 2 Black 620, it was held that the State of New York in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds, or other securities of the United States not liable to taxation by the State. And see Bank Tax Case, 2 Wall. 200; Home Savings Bank v. Des Moines, 205 U. S. 503, 509.

"*It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States.*" (Emphasis supplied.)

Thus, the principle that the constitutional and statutory immunity from State taxation of federal bonds and other obligations is a complete immunity has been recognized many times. The States may not tax such securities even though the tax is not imposed directly on the federal obligations, but is imposed upon the net worth of the corporate taxpayer.

Even nondiscriminatory taxes by the states are objectionable because differences from state to state would tend to affect marketability, and because it would be impossible for the federal government to anticipate changes in the tax laws of the states. Furthermore, an ad valorem tax upon capital always bears with greater weight upon

low interest bearing securities such as bonds issued by the United States, as compared with securities yielding a greater rate of interest. The tax in the present instance is two mills on the dollar of corporate net worth, but if this tax is sustained there will be no legal impediment to State taxation at a much higher rate.

In 1938, the Department of Justice published a survey entitled "Taxation of Government Bondholders and Employees." Although questioning the soundness of several of this Court's decisions respecting other kinds of taxes, it did not take exception to the basic theory of the *Bank of Commerce* line of cases. It stated (pp. 24-25):

> "The Court has many times considered the validity of taxes imposed upon the 'capital' or the 'assets' of corporations. In each of the cases it has held the tax invalid unless provision were made for deducting the value of government bonds held by the corporation. Whatever the measure of taxation which is adopted, if the Court concludes that it is in effect imposed upon the property held by the corporation, the value of its government bonds must be deducted. * * *"

Section 3701 of the Revised Statutes of the United States (U. S. Code, Title 31, Section 742) specifies that, except as otherwise provided by law, all bonds and other obligations of the United States "shall be exempt from taxation by or under State or municipal or local authority." Section 3701 was derived from a series of earlier statutes commencing with the Act of February 25, 1862, 12 Stat. 345, 346. These various statutes are reviewed in a footnote in *Smith v. Davis*, 323 U. S. 111, 117. The clear purpose of these statutes was to confirm the constitutional immunities established by the Supreme Court of the United States in *Weston v. City Council of Charleston*, 2 Peters 449, and other decisions previous to the enactment of the statutes.

II.

A TAX UPON SHARES OF STOCK, AS PROPERTY OF THE STOCKHOLDERS, IS DISTINGUISHABLE FROM A TAX UPON PROPERTY OF THE CORPORATION; BUT THIS DISTINCTION IS MEANINGLESS IN THE CASE OF A TAX UPON AN INCORPORATED MUTUAL SAVINGS BANK, MEASURED BY ITS NET WORTH, WHERE THE BANK ALONE IS LIABLE FOR THE TAX, AND WHERE NO RIGHT OF REIMBURSEMENT IS PROVIDED.

A. This Court has recognized that a State tax upon shares of stock, measured by its book value, may include the value of federal securities owned by the corporation in ascertaining such book value; but this rule is predicated upon the tax being enforceable against the stock or its owners.

That a tax upon shares of stock as property of stockholders is distinguishable from a tax upon corporate capital or surplus, has been settled by decisions of this Court. *Van Allen v. Assessors*, 3 Wall. 573; *Cleveland Trust Co. v. Lander*, 184 U. S. 111; *Des Moines National Bank v. Fairweather*, 263 U. S. 103. Such taxes are held valid, even though based on a valuation which reflects the value of exempt securities owned by the corporation, on the ground that the shareholders' property right in the shares of stock is distinct from the property of the corporation.

B. If a State tax is nominally upon shares of stock, but enforceable only against the corporation, without recourse of the corporation for reimbursement against the stock or stockholders, the value of federal securities owned by the corporation must be excluded from the tax base.

Where a State tax is ostensibly assessed against shares of bank stock, but the bank alone is liable for payment of

the tax, without right of reimbursement against the shareholders, this Court has held that such tax, measured by the bank's capital and surplus without deduction of the value of bonds of the United States owned by the bank, is unconstitutional. *Home Savings Bank v. Des Moines*, 205 U. S. 503.

C. The Ohio Supreme Court's characterization of the tax here involved, as a tax upon the "intangible ownership interest" of depositors in the capital employed in a mutual savings bank, measured by the bank's net worth, does not justify inclusion of federal securities owned by the bank in the calculation of the tax, because the bank alone is subjected to the tax, without recourse against the depositors or against separate property of depositors.

The Ohio Supreme Court sought to distinguish the *Bank of Commerce* line of cases by characterizing the Ohio tax in question as a tax, not upon the property of the bank, but upon an "intangible ownership interest" of the depositors in the net worth of the bank, the argument being that, because depositors are the only persons who might have any beneficial interest in the net worth of a mutual savings bank, it may be said that the tax is against such beneficial interest. At the same time, the Ohio Supreme Court sought to distinguish *Home Savings Bank v. Des Moines*, 205 U. S. 503, and *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, from the present case, on the theory that here the corporation possessed the equivalent of a "right of reimbursement" because the equity of the depositors, i.e., the value of their "intangible property interest" in the bank was reduced by the amount of the tax paid. The reasoning of the Ohio Supreme Court is expressed as follows (R. 42):

"In Sections 5672 and 5673, General Code, provisions are made to insure reimbursement from its shareholders by a financial institution on account of taxes paid by it which were assessed on its nonwithdrawable shares. Likewise provisions to insure reimbursement on account of payment by a financial institution of taxes assessed upon its deposits as taxable property of its depositors and its withdrawable shares as taxable property of its shareholders are made in Sections 5673-1 and 5673-2, General Code. *However, it is arguable that, unless these latter two sections are given a broader construction than their words appear to justify, there is no specific statutory provision which would enable an incorporated financial institution, the capital stock of which is not divided into shares or which has no capital stock, to secure reimbursement from those who are or may be owners of the intangible property representing the capital employed by such owners in the corporation. In our opinion, such a provision is not necessary to enable such a financial institution to secure such reimbursement.* * * *

"With respect to that species of intangible property which represents the ownership interests in a corporation, the capital of which is not divided into shares or which has no capital stock, payment by the financial institution of the tax will always in effect amount to payment by those who are the beneficial owners of such intangible property. Such payment will necessarily reduce the amount, which the corporation will have available for payment of interest to depositors or holders of withdrawable shares and which will be available for protection of their deposits or stock claims and for distribution to them in the event of liquidation of the corporation. Thus, the financial institution, which pays the tax on their property interests in the corporation, will always be able to reimburse itself by reducing the ultimate value of the property interests of those who are the only ones who

> can have any claim to benefit from the ownership interests taxed." (Emphasis supplied.)

Assuming, arguendo, that the construction of Sections 5408 and 5412, Ohio General Code, as determined by the Ohio Supreme Court, is correct, and the tax is a tax upon "intangible ownership interests" of the depositors in the net worth of a mutual savings bank, nevertheless the fact remains that the tax is assessed against and is paid by the bank. The tax falls, both initially and ultimately upon the corporation, because there is no provision of law whereby it can be recovered by the corporation from the depositors personally or out of property of the depositors. The depositors are not personally liable for the tax, either primarily or otherwise. The tax is and remains, therefore, a burden upon ownership of federal securities by the corporation. That the depositors' *equity* in the corporation is diminished proportionately as the net worth of the corporation is reduced, by payment of the tax, does not result in *reimbursement* of the taxpayer corporation; its net worth remains diminished without possibility of restoration by reimbursement. "In paying the tax the corporation has paid its own debt and not that of others, and there is nothing in such payment from which the law can imply a promise of reimbursement." *Home Savings Bank v. Des Moines*, 205 U. S. 503, 511.

Furthermore, as pointed out in the dissenting opinion of Judge Stewart of the Supreme Court of Ohio in the present case, the argument based upon the theory that the equity of depositors in a mutual savings bank is automatically reduced by the tax would apply with equal force to the equity of stockholders in a financial institution that issued stock. Judge Stewart commented as follows (R. 50):

"Admitting that there is no way for the institution to obtain reimbursement from such depositors for the tax paid on the assets, yet it is said that the depositors really pay it because the tax creates a decrease in the assets of the institution in which they have intangible rights. It would not be contended that a tax could be assessed against the capital, surplus, reserve fund, and undivided profits of a bank with shares, without deducting any federal securities from the property assessed, and yet the same argument could be made to the effect that such a tax was against the shareholders because it would decrease the amount of assets in the bank, which they, as shareholders, own."

In substance, if the judgment of the Supreme Court of Ohio in the present case is to stand, a device has been found by which a long line of decisions of the Supreme Court of the United States, commencing with *Bank of Commerce v. New York City*, 2 Black 620 (1863), and including the recent case of *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U. S. 665 (1950), may be set at nought. A state legislature, or the courts of a State, in order to sustain a tax upon federal securities as part of the net worth of a corporation, have merely to characterize the tax as being a tax upon property of those to whom the equity in the corporate net worth would belong in the event the corporation were dissolved, be they stockholders or others, and the tax assessed against and payable by the corporation would then be unassailable.

In distinguishing *Home Savings Bank v. Des Moines*, 205 U. S. 503, and *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, from the present case, the Supreme Court of Ohio asserted that in those cases the taxes were assessed upon property of the banks, whereas

in the present case the tax is upon property of the depositors. Such a distinction, however, is without significance if the bank is required to pay the tax, with no right of reimbursement against the depositors, and if the so-called "intangible ownership interest" of the depositors is merely their equity in the net worth of the bank, which is automatically reduced in value by the bank's payment of the tax.

In *Home Savings Bank v. Des Moines*, 205 U. S. 503, the State taxed banks upon the value of their capital stock, measured by net worth less the value of real estate owned. The tax was assessed against the banks and not against individual stockholders, and no provision was made for reimbursement out of separate property of the stockholders. The Supreme Court of the United States held that the tax was void to the extent that it included the value of federal obligations owned by a bank in the tax base. In answer to the argument of the State, that the tax was on property of the stockholders because they owned the stock nominally taxed and because the tax exacted of the bank operated to reduce the equity of the stockholders, this Court spoke as follows (205 U. S. 503, at 511 and 519):

> "* * * The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt, and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks. The fair interpretation of the law is that the taxes are upon the property of the banks. * * *"

"One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence. * * *"

Thus, the precise argument advanced in the majority opinion of the Supreme Court of Ohio, in the present case, was refuted by the Supreme Court of the United States in the case of *Home Savings Bank v. Des Moines*, 205 U. S. 503. If a tax is exacted of a banking corporation, measured by its net worth, and value of federal obligations owned by the corporation is included in the computation of net worth, the tax is necessarily a burden upon the federal obligations, and it is immaterial whether the net worth is regarded as property of the corporation or property of its stockholders or depositors.

The economic burden theory advanced by the Ohio Supreme Court breaks down when examined from another standpoint. According to the theory, the depositors of a mutual savings bank own the bank; hence a property tax upon the net worth of the bank is in reality a tax upon the depositors, and the separate corporate entity of the bank may be disregarded for purposes of adjudging the constitutional validity of the tax. If, however, the corpo-

rate entity is to be disregarded for the purpose of ascertaining who ultimately pays the tax, it should with equal logic be disregarded in ascertaining who ultimately owns the United States bonds value of which is included in the tax base. The full circle is completed, and again the tax is a burden upon ownership of federal securities.

D. The theory of the Ohio Supreme Court, treating the tax as imposed upon property of depositors, is artificial and unsound.

The artificiality of the theory advanced by the Supreme Court of Ohio for sustaining the validity of the tax in this case is made apparent when the position of a depositor, as respects the surplus and reserves of an incorporated mutual savings bank, is considered. The depositor does not own the property comprising the assets of the bank. So long as the bank is a going concern his "ownership interest" is limited to his deposits and distributions of earnings with respect thereto which may be authorized by the bank's board of trustees. The relationship between the depositor and the bank, as respects his deposit, is that of creditor and debtor. The bank may terminate the relationship at any time by paying out the balance of the deposit, and nothing more, to the depositor. The depositor has no interest or property right, which can be bought, sold or dealt with in any way, separate and apart from his deposit. The value of his interest can never rise above his deposit. The surplus of the bank is accumulated and held solely to insure the depositors against loss of their deposits. The depositors have no interest in the surplus and reserves of the bank by which they can compel distribution.

When a depositor withdraws his deposit, any possible interest that he may have in the bank's surplus is termi-

nated without any payment in respect thereto. When a new account is opened, the new depositor has all the protection provided by the bank's existing surplus, in common with other depositors, without payment therefor. The Ohio law is silent as to what disposition is to be made of the surplus in the event of liquidation of a solvent mutual savings bank. While it may be presumed that in such event the surplus would be distributed in some fashion among existing or former depositors, the method for determining the persons, and the formula for determining the proportion of the surplus to be distributed to each is unknown and presently undeterminable. Certain it is that the right, if any, to share in such surplus is not vested, and cannot be regarded as an existing property right to which value can be ascribed. To the extent that an "intangible ownership interest" exists, it is an inseparable and indivisible part of the deposit. The deposit is already otherwise taxed. If depositors were actually taxed upon their supposed "intangible ownership interest" in the bank's surplus and reserves, a constitutional question would be presented whether a tax could be exacted upon a nominal property interest which is not property of the taxpayer in any real sense because he can neither sell it nor transfer it in any way and it has no realizable value to him whatever.

The Supreme Court of Ohio attempted to gloss over the absurdity of its theory by pointing out a supposed analogy to the taxability of shares of stock, arguing that the book value of shares of stock does not necessarily reflect market value (R. 45).

Shares of stock, however, are subject to the dominion of their owner, and their market value is not wholly unrelated to book value. Whatever the value of the shares, it passes by transfer of the shares. In contrast, depositors

in a mutual savings bank possess nothing that they can transfer, or sell, over and above or separate from the bank's indebtedness represented by the amount of their deposits. The related property interests of bank and depositors are well stated in *Collett v. Springfield Savings Society*, 13 Ohio Circuit Court Reports 131, 7 Ohio Circuit Decisions 146 (1896), affirmed without opinion, 56 O. S. 776. (13 O. C. C. at 143-144):

> "* * * By reason of the peculiar character of such a society, the value of a depositor's interest, so long as the society continues doing business, can never rise above par, and, therefore, for purposes of taxation, does not represent the furniture, real estate, surplus, and undivided profits.
>
> "This is so because the depositor has no occasion to sell his interest, the law providing that he may withdraw his deposit, and no one would give a depositor more than par because on depositing an equal amount the law gives such person an interest just as valuable. The real estate and furniture are for the purpose of transacting the business of the society, and the latter depositors would receive from them and from the surplus just as much benefit as the former. The surplus, the law provides, is to be accumulated and held to insure the depositors against loss from a depreciation of investments, and it adds no more to the taxable value of a depositor's 'property' in the society than does other insurance to the taxable value of the property it covers."

The language quoted was perhaps dictum in the context in which it was said. Nevertheless it correctly states the position of depositors in mutual savings banks.

III.

THE CHARACTERIZATION OF THE TAX BY THE SUPREME COURT OF OHIO, AS A TAX UPON PROPERTY OF DEPOSITORS, IS NOT CONCLUSIVE IN DETERMINING THE REAL NATURE OF THE TAX AND ITS EFFECT UPON THE FEDERAL RIGHT ASSERTED.

The characterization by the Ohio Supreme Court of the tax now under review, as a tax upon "intangible ownership interests" of the depositors in an incorporated mutual savings bank (despite the fact that the bank alone is liable for payment of the tax, without right of reimbursement), is not conclusive upon this Court. Where a federal right is concerned the Supreme Court of the United States is not bound by the characterization given to a state tax by state courts or legislatures. A long line of judicial construction establishes the principle that the duty rests upon this Court to decide for itself facts or constructions upon which federal constitutional issues rest. *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 121; *New Jersey Realty Title Ins. Co. v. Div'n of Tax Appeals*, 338 U. S. 665, 674; *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 84; *United States v. County of Allegheny*, 322 U. S. 174, 184; *Wisconsin v. J. C. Penny Co.*, 311 U. S. 435, 443; *Senior v. Braden*, 295 U. S. 422, 429.

CONCLUSION.

The judgment of the Supreme Court of Ohio should be reversed and the cause remanded for the purpose of restoring to appellant, pursuant to Ohio law, the excessive tax collected.

Respectfully submitted,

DAVID A. GASKILL,
JAMES A. WEEKS,
ROBERT F. MASKEY,
EDGAR P. STOCKER,
Attorneys for Appellant.

Dated: January 31, 1955.

APPENDIX A.

Provisions of the Ohio General Code, additional to those quoted on pages 3-4 of this brief, and pertinent to be considered therewith, are set forth below.

Section 5324:

"The term, 'deposits' as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable."

Section 5406:

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipal corporation, school district, township, or other subdivision thereof, or to any other financial institution, or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds

of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in arriving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited."

Section 5409:

"The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution."

Section 5411:

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding."

Section 5411-1:

"On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions

shall be listed and assessed. The day so fixed shall be between the first and the thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby."

Section 5411-2:

"The report of each financial institution made pursuant to section 5411 of the General Code shall also show the aggregate balances of the taxable deposits of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received, then between the day so fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day so fixed.'

Section 5638-1:

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumer-

ated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *."

Section 5672:

"Taxes assessed on non-withdrawable shares of stock, of a financial institution, shall be a lien on such shares from the first day of January in each year until they are paid.

"It shall be the duty of every financial institution to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of state and any financial institution failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

Section 5673:

"Such financial institution paying to the treasurer of state the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner."

Section 5673-1:

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every day of delay in the payment of such taxes."

Section 5673-2:

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and/or upon its withdrawable shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer."